United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7588

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

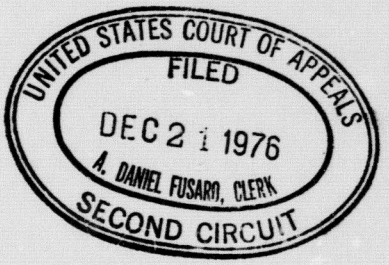
GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED

1. Does §131-k of New York's Social Services Law render ineligible for AFDC benefits persons, such as the plaintiff, who are eligible under federal standards?

2. Did the district court err in refusing to call for the convening of a three judge court to hear and determine plaintiff's constitutional claims?

STATEMENT OF THE CASE

In this action, the plaintiffs challenge the validity of Section 131-k of the New York State Social Services Law and the regulation of the New York State Department of Social Services promulgated thereunder, Section 349.3 of Title 18 of the New York Codes, Rules and Regulations. The statute and regulation, as enacted and applied by defendants, operate to deprive certain aliens residing in the United States under color of law, and their families, of their rights to public assistance under the New York State program of Aid to Families with Dependent Children. Plaintiffs contend that the state law, as enacted and applied, is invalid because it is inconsistent with federal law and regulation, under which all aliens residing in the United States under color of law may be eligible for public assistance. Further, the plaintiffs contend that the state law, as enacted and applied, violates rights secured to them by the Fourteenth Amendment to the United States Constitution. This action was commenced on April 17, 1975, at which time Judge Burke issued an Order to Show Cause relating to plaintiffs' motion for preliminary relief. Defendants moved to dismiss the Complaint.

Judge Burke granted defense motions dismissing the complaint on the grounds that the defendant welfare commissioners were "not within the scope of [42 U.S.C.] Section 1983",

that there was no substantial constitutional claim asserted and that there had been no showing that the controversy involved $10,000.00 exclusive of interest and costs. The plaintiff filed her notice of appeal on August 4, 1975.

Judge Burke's dismissal of the complaint was reversed by this Court, 529 F.2d 1294, cert. den. 96 S.Ct. 3181, and the matter remanded for consideration of the statutory conflict claims by the single judge and, if necessary, the convening of a three-judge court to hear and determine the constitutional issues.*

After both the defendants had answered, plaintiff moved for summary judgment on July 12, 1976, and both defendants made timely cross-motions for summary judgment. On November 18, 1976, the district court granted the cross-motions of the defendants and denied both the plaintiff's motion for summary judgment and her request that a three-judge court be convened to hear the constitutional claims [95].** Plaintiff's notice of appeal was filed in the district court on November 24, 1976.

The plaintiff Gayle McQuoid Holley is a citizen of Canada. She first entered the United States in 1954, as a temporary non-immigrant student [5]. With the exception of

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* Pursuant to the suggestion of this Court, plaintiff's counsel requested the views of the Department of Health, Education and Welfare regarding the "statutory conflict" issues and was advised that a request from the district court for HEW's appearance amicus curiae was required. A request to the district court, dated April 7, 1976, that HEW be invited to participate was not responded to.

** Numerals in [ ] refer to pages in the Appendix.

3 months in 1958, she has resided in the United States ever since. She is the mother of the six minor plaintiffs, citizens of the United States by birth. The United States Immigration and Naturalization Service, the federal agency with exclusive authority to regulate the admission and residence of aliens in the United States, is fully informed regarding the plaintiff family's situation. The Service has determined that although plaintiff Gayle Holley is an illegal, deportable alien, she will be allowed to remain in the United States for humanitarian reasons, to prevent the separation of mother and children [13].

In 1968, Plaintiff Holley began receiving public assistance under the New York State AFDC program. In 1974, at the time this action arose, she was receiving an AFDC for seven persons, her six children and herself as the responsible parent with whom they resided [5]. The New York State legislature, in 1974, enacted Section 131-k of the New York State Social Services Law, which provided that every alien "unlawfully residing in the United States" would be ineligible for public assistance. In applying the new law to the plaintiff's family, the defendants determined the mother to be ineligible for public assistance and reduced the family grant by one-seventh, the share allocated to meet the needs of the mother [15].

It is the reduction of the plaintiff family's grant of AFDC, mandated by state law, that plaintiffs challenge.

ARGUMENT

POINT I

NEW YORK SOCIAL SERVICES LAW, §131-K, IS INVALID AS CONTRAVENING FEDERAL REGULATIONS

Just as the state laws and regulations establishing the state program of Aid to Families with Dependent Children (AFDC) must be consistent with the provisions of the Social Security Act, King v. Smith, 392 U.S. 309 (1968), so too the state provisions must be consistent with the regulations of the Department of Health, Education and Welfare implementing the federal law. Schneider v. Whaley, 541 F.2d 916 (2nd Cir. 1976). The same principles of supremacy of federal law and cooperative federalism operate to invalidate a state law that conflicts with, and excludes from eligibility for public assistance persons eligible under, the federal regulations.

Title 45 C.F.R. §233.50, issued by the Department of Health Education and Welfare to be effective on January 2, 1974, spoke to the issue of the eligibility of aliens for public assistance. That regulation provides that public assistance shall be provided to persons otherwise eligible who are either (a) citizens; or (b) lawfully admitted permanent resident aliens; or (c) aliens "otherwise permanently residing in the United States under color of law," including parolees and conditional refugees.

The plaintiff is neither a citizen of the United States nor a lawfully admitted permanent resident alien, as that term is defined by the Immigration and Naturalization Act. It is contended that she is an alien permanently residing in this country under color of law, as that term is used in 45 C.F.R. §233.50.

The term "under color of law" does not appear in the Immigration and Naturalization Act. It is the creature of the Department of Health, Education and Welfare, intended to extend the category of aliens eligible for public assistance beyond those lawfully admitted. To date, the courts have not interpreted the phrase "under color of law" as here applied.*

The regulation states that "under color of law" includes refugees conditionally admitted to the United States pursuant to 8 U.S.C. §1153(a)(7) and parolees admitted to the United States pursuant to 8 U.S.C. §1182(d)(5). The Handbook of Immigration Law and Procedure, by Charles Gordon and

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* In other contexts the phrase has been liberally construed to cover even actions, by persons with purported authority, directly contrary to law. See United States v. Wiseman, 445 F.2d 792 (2nd Cir. 1971); Wall v. King, 206 F.2d 878 (1st Cir. 1953), cert. den. 346 U.S. 915 (1953).

Harry N. Rosenfield (Matthew Bender, 1973) defines the parole status as follows:

> For many years the administrative authorities have been exercising an additional discretionary authority known as parole. This dispensation does not grant any legal residence status. However, it allows temporary harborage in this country for humane considerations or for reasons rooted in public interest. This is a device of wide flexibility. Among examples that can be cited are parole... to prevent inhuman separation of families. Pp. 2-48, 2-49.

The plaintiff does not have the official status of parolee from the Immigration and Naturalization Service. Her situation is, however, analogous to that of a parolee inasmuch as she has resided in the United States for twenty years with the knowledge of I.N.S. The Service,in its discretion, has consented to her continuing residence to avoid the inhumane separation of her family.

Section 233.50 states that the term "under color of law" includes*, and therefore is not limited to, conditional refugees and parolees. There are, then, other aliens, without official official refugee or parolee status, who are in the United States "under color of law" for purposes of the regulations. Surely the aliens encompassed by that language are those who, like a parolee, are not "lawfully" residing in the country, but are permanently residing with the consent of the I.N.S.

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* Congress, in the Social Security Act, which 45 C.F.R. §233.50 seeks to implement, has stated that the term "includes", "shall not be deemed to exclude other things otherwise within the meaning of the term defined." 42 U.S.C. 1301 (b).

The plaintiff is such an alien.

The New York State legislature responded to the issuance of 45 C.F.R. §233.50, by enacting section 131-k of the New York State Social Services Law which denied public assistance to all persons "unlawfully residing" in the United States. The implementing administrative letter of the New York State Department of Social Services, 74 ADM-110, instructed local agencies that applicants are to be considered eligible for public assistance only if they can prove either (a) citizenship; (b) status as a lawfully admitted permanent resident alien; or (c) permanent residence under color of law, which is limited to persons admitted as parolees or conditional refugees [67].

Section 131-k, as enacted and applied by defendants, thus excludes from eligibility for public assistance the plaintiff, who is eligible under federal regulations. The more restrictive state law is thus invalid, under the principles of supremacy and "cooperative federalism" enunciated in King v. Smith, supra.*

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* The district court held, as a matter of law, that the plaintiff was not "permanently residing in the United States under color of law" [96]. This finding was not only contrary to a fair interpretation of the "color of law" language of 45 C.F.R. §233.50, as discussed above, but also ignored the definition of "permanent" established by Congress for use in the immigration statutes: "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. §1101(a)(31).

POINT II

NEW YORK SOCIAL SERVICES LAW, §131-K, IS INVALID AS CONTRAVENING THE SOCIAL SECURITY ACT OF 1935

Congress has established the AFDC program * as a cooperative federal/state mechanism to provide financial assistance and services "to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection". Social Security Act of 1935, §401, 42 U.S.C. §601. When the program was initially adopted in 1935 it provided solely for the needs of dependent children and not for those who shouldered either the legal or practical burden of support. Although the intent of the program was to permit the responsible relative to eschew the wage-earning role, "it failed to provide sufficient inducement for the parent to remain in the home, since the amount of assistance was measured solely by the child's needs". New York State Department of Social Services v. Dublino, 413 U.S. 405, at 427 (1973).

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* 42 U.S.C. §§601-644.

In 1950, in recognition of this deficiency, the Congress amended 42 U.S.C. §606(b)(1) * to provide that aid also be provided "to meet the needs of the relative with whom any dependent child is living". In its report recommending the passage of this amendment, the House of Representatives made the following observations:

> In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly, in families with small children, it is necessary for the mother or other adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs. House Report No. 1300, cited in Shirley v. Lavine, 365 F. Supp. 818, 822, aff'd 420 U.S. 730 (1975).

Since the amendment of §606(b)(1), the courts have consistently recognized this "caretaker grant" as an integral part of the benefits accruing to eligible dependent children.

> The AFDC provisions of the Social Security Act envision aid to strengthen the entire family unit, including the dependent child's parent, so as to encourage the care of the child within its own home. See 42 U.S.C. §601. A

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* 70 Stat. 850.

> procedure which directly or indirectly lessens the benefits flowing to the dependent child should not be approved. [Citations omitted.] Doe v. Gillman, 479 F.2d 646, at 648 (8th Cir. 1973).
>
> This regulation [rendering mother ineligible for AFDC benefits due to her failure to cooperate in paternity proceedings], while in form directed at the mother rather than the child, has the same vice as the original [which denied benefits to the entire family]. It reduces the assistance to the family by creating an additional eligibility requirement ... not authorized by the federal statute. Doe v. Harder, 310 F. Supp. 302, at 303 (D. Conn. 1970), app. dis. 399 U.S. 902 (1970).

See, also, Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1973); Shirley v. Lavine, supra.

Each of the cases cited above involved attempts to restrict the eligibility of caretaker relatives by imposing a duty, unrecognized by federal law, to name the father of AFDC eligible children as a condition of caretaker eligibility. In each case the requirement was found to be contrary to provisions of the Social Security Act and, thus, invalid. Cf. Townsend v. Swank, 404 U.S. 282 (1971). In Lopez v. Vowell, 471 F.2d 690 (5th Cir. 1973), cert. den. 411 U.S. 939 (1973), a federal Court of Appeals struck down, on the same ground, a Texas administrative regulation that prohibited the granting of the "caretaker grant" to any person who was married and living with their spouse.

> The challenged regulations are precisely the type of blanket exclusion from eligibility condemned by Townsend. Section 406(b)(1) [42 U.S.C. §606(b)(1)] defines "aid to families with dependent children" as payments to meet the needs of both the dependent children and the caretaker relative with whom the children reside. Nowhere does the statute indicate that the caretaker must be a single individual in order for his or her needs to be included in calculating the amount of the AFDC grant. 471 F.2d at 693-694.

It is clear, then, that a state may no more limit AFDC eligibility of caretaker relatives "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history,"* than it could limit the eligibility of the children themselves. Cf. King v. Smith, 392 U.S. 309 (1968); Lewis v. Martin, 397 U.S. 552 (1970); Carleson v. Remillard, 406 U.S. 598 (1972).

In the present case the State of New York has enacted legislation, §131-k of its Social Services Law, which operates to disqualify certain caretaker relatives of AFDC-eligible dependent children of the "caretaker grants" provided under the AFDC program. This statute renders ineligible for any form of public assistance directly administered by the state, including AFDC, any alien who "is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully

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* Townsend v. Swank, 404 U.S. at 287 (1971).

residing in the United States". Social Services Law, §131-k (1). Administrative guidelines promulgated by the defendant Commissioner of Social Services interpret lawful residence to include permanent residence in the United Saates resulting from classification as a "conditional" entrant or a "refugee" by the Immigration and Naturalization Service. Administrative Letter 74 ADM-110, dated August 1, 1974 [67]. *

Pursuant to the provisions of §131-k and its implementing regulation (18 N.Y.C.R.R. §349.3) the plaintiffs were notified on August 20, 1974, that the family grant of AFDC would be reduced from $513.83 to $463.50 permonth, a reduction of $50.33 per month [14]. In a subsequent administrative hearing the defendant Commissioner upheld the action of local social services officials, finding that appellant Gayle Holley was "an alien illegally residing in the United States" [15].

The Social Security Act provides that "caretaker grants" shall be provided to persons who (1) reside with dependent children (42 U.S.C. §606[b][1]); (2) are relatives

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* The enactment of §131-k and its subsequent implementation were in response to the promulgation by HEW of regulations relating to alien eligibility for AFDC benefits, 45 C.F.R. §233.50, which, in turn, were the purported result of the Supreme Court's decision in Graham v. Richardson, 403 U.S. 365 (1971). The applicability of these federal regulations are discussed, supra, at pp. 5-8 .

of such dependent children in the degree set out in the statute (42 U.S.C. §606[a]); and (3) are "needy" (42 U.S.C. §606[b][1]). The plaintiff mother of concededly eligible children has met, and continues to meet, all of the federal requirements for a "caretaker grant" but has been denied assistance, under state law, solely on the ground of her alien status. Such a result is impermissible under the supremacy clause of the federal Constitution.

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* These are father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew and niece.

POINT III

THE DISTRICT COURT ERRED IN REFUSING PLAINTIFF'S REQUEST FOR A THREE-JUDGE COURT

In this Courts' previous decision in this case, 529 F.2d 1294 , it recognized both the efficacy of the district court's addressing the "statutory conflict" issues and the potential ultimate requirement of convening a three-judge court to hear the plaintiff's constitutional claims. The plaintiff sought a determination of the merits in the correct procedural manner (cf. Hagans v. Lavine, 415 U.S. 528 [1974]) seeking (1) summary judgment on the "single judge" claims, and (2) if necessary, a three-judge court to hear the constitutional claims raised in her third cause of action.

Without explanation of his reasons for doing so,* Judge Burke refused to convene a three-judge court even though he had denied relief to the plaintiff on the statutory claims. Should this Court affirm his granting of summary judgment as to those claims, this case should be remanded for a convening of the three-judge court. Cf. Taylor v. Lavine, 497 F.2d 1208 (2nd Cir. 1974), rev'd on other grounds 419 U.S. 1046 (1975).

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* The lack of discussion of the legal issues involved in this case by the district court leaves the litigants somewhat in the dark as to its reasoning and is, unfortunately, not an isolated occurrence. See, e.g., the district court's decision and order of July 30, 1975, dismissing the complaint in this action and Noble v. University of Rochester, 535 F. 2d 756, 757 n. 2 (2nd Cir. 1976).

CONCLUSION

For the foregoing reasons, the judgment of the district court, granting summary judgment to the defendants, should be reversed and the case remanded for entry of summary judgment for the plaintiff. It will be necessary for the district court to consider the nature of the monetary relief to be awarded, and against whom (cf. Edelman v. Jordan, 415 U.S. 651, 667 n. 12 [1974]; Jones v. Berman, 37 N.Y.2d 42, 55 [1975]) it should be levied. The additional question of the propriety and amount of attorneys' fees to be awarded should be presented to the district court. Cf. Civil Rights Attorney's Fee Awards Act of 1976, P.L. 94-559;* Torres v. Sachs, 538 F.2d 10 (2nd Cir. 1976).

In order that an expeditious hearing and determination of these questions be achieved, plaintiff requests that this Court suggest that the Chief Judge for the Western District of New York reassign this matter on remand. Cf. Egelston v. State University College at Geneseo, 535 F.2d 752 (2nd

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* The legislative history of this act indicates that it should be applied to pending cases. Section 122 Cong. Rec. at H 12160 (October 1, 1976); 122 Cong. Rec. at S 17052 (September 29, 1976).

Cir. 1976); Noble v. University of Rochester, supra.

Respectfully submitted,

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Dated: Rochester, New York
December 13, 1976

APPENDIX A

Federal Statutes

42 U.S.C. §601:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. §606(b)(1):

> (b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipeint makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent

child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title),... .

Federal Regulations

45 C.F.R. §233.50:

> Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act).

State Statutes

Social Services Law, §131-k:

> 1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of thirty days in accordance with subdivision two of this section.
>
> 2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical

assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance.

State Regulations

18 N.Y.C.R.R. §349.3:

349.3 Illegal aliens.

(a) Any inconsistent provisions of this Title notwithstanding, an alien who is unlawfully residing in the United States, or fails to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, is not eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of 30 days in accordance with subdivision (b) of this section.

(b) An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States, or because he failed to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, shall, nonetheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed 30 days from the date of such determination in order to allow time for the referral of the case to the United States Immigration and Naturalization Service, or the nearest consulate of the country of the applicant

cr recipient, and for such service or consulate to take appropriate action or furnish assistance.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GAYLE McQUOID HOLLEY, et al.,

Plaintiff-Appellant,

-vs-

ABE LAVINE, et ano.,

Defendants-Appellees.

Docket No. 76-7588

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 1976, I served the following documents upon counsel for the appellees, by causing copies to be mailed, postage prepaid, to Alan W. Rubenstein, Assistant Attorney General, The Capitol, Albany, New York 12224, and Charles G. Porreca, Esq., Monroe County Department of Social Services, 111 Westfall Road, Rochester, New York 14620, to wit:

appendix and appellants' brief.

K. Wade Eaton

K. WADE EATON, ESQ.

Dated: December 13, 1976